Supreme Court, U.S.
FILED

(1) 99 211 AUG 2 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DOROTHY NASH-HOLMES, *et al.*,

Cross-Petitioners,

v.

HERB HALLMAN CHEVROLET, *et al.*,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

MELANIE FOSTER
OFFICE OF WASHOE COUNTY
DISTRICT ATTORNEY
195 South Sierra Street
Third Floor
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3400

Attorney for Cross-Petitioner Washoe County

LARRY R. HICKS
Counsel of Record
PAUL J. GEORGESON
MCDONALD CARANO WILSON
MCCUNE BERGIN FRANKOVICH
& HICKS LLP
241 Ridge Street
Fourth Floor
Reno, Nevada 89505-2670
(775) 788-2000

Attorneys for Cross-Petitioners Dorothy Nash-Holmes, Donald Coppa, Karl Hall III, Frank Landes, James Long and Michael Neville

154191

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

4788

QUESTION PRESENTED FOR REVIEW

Whether a prevailing defendant in a civil rights action can ever be awarded attorney's fees under § 1988 of the Civil Rights Act.

LIST OF PARTIES

Cross-Petitioners:

DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County

KARL HALL, III, individually and in his official capacity as Assistant District Attorney for Washoe County

FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney

WASHOE COUNTY, a political subdivision of the State of Nevada

Cross-Respondents:

HERB HALLMAN CHEVROLET, INC.,
a Nevada corporation

JOHN P. STANKO

JERRY VAN DER HOEVEN

JAMES BAYUS

STAN BONDICK

CRAIG CONRAD

TOM GEORGE

RON HALL

JOHN JULIAN

JUDY LIMON

DAN MAHONEY

EDWARD J. MATTS

RON SHERK

GREG STEWARD

ALEX VARGO

CLIFFORD SOUZA

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iv
Table of Cited Authorities	v
Table of Appendices	vi
Citations to Reports and Orders Entered	1
Concise Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Argument	8
I. The Ninth Circuit Failed To Address Certain Grounds Upon Which The District Court Awarded Attorneys' Fees.	8
II. The Ninth Circuit Misapprehended Nevada Law With Regard To The Issue Of Whether Business Goodwill Is A Protected Property Right In Nevada.	10
III. Although The Ninth Circuit Properly Cited An "Abuse Of Discretion" Standard Of Review, It Essentially Reviewed The District Court's Findings *De Novo*.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Ford v. Ford, 782 P.2d 1304 (Nev. 1989) 10, 11

Hensley v. Eckerhart, 461 U.S. 424 (1983) 11

Malmquist v. Malmquist, 792 P.2d 372 (Nev. 1990) 11

Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) 3

Williams v. Waldman, 836 P.2d 614 (Nev. 1992) .. 11

Zale-Las Vegas, Inc. v. Bulova Watch Co., 396 P.2d 683 (Nev. 1964) 10, 11

Statutes:

28 U.S.C. § 1254 1

42 U.S.C. § 1983 7

42 U.S.C.S. § 1988 ..... i, 2, 13

Rule:

United States Supreme Court Rule 12.5 1

APPENDIX

Page

Appendix A — Order Of The United States District Court For The District Of Nevada In *Herb Hallman Chevrolet, et al. v. Dorothy Nash Holmes, et al.* Dated June 18, 1997, Filed June 19, 1997 And Entered June 20, 1997 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Nevada In *Jerry Van Der Hoeven v. Donald Coppa, et al.* Dated June 18, 1997, Filed June 19, 1997 And Entered June 23, 1997 ..... 4a

Appendix C — Order Of The United States District Court For The District Of Nevada In *Herb Hallman Chevrolet, Inc., et al. v. Dorothy Nash-Holmes, Et Al.* Dated And Filed September 25, 1997 And Entered September 29, 1997 ..... 7a

Appendix D — Opinion Of The United States District Court For The District Of Nevada In *Jerry Van Der Hoeven, et al. v. Donald Coppa, et al.* Dated And Filed September 25, 1997 ..... 17a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed April 29, 1999 ..... 27a

CITATIONS TO REPORTS AND ORDERS ENTERED

The Opinion by the Court of Appeals for the Ninth Circuit is reported at 169 F.3d 636 (9th Cir. 1999), and is set forth in Petitioners' original Appendix at App. 1. The district court entered two separate Orders in each case with respect to attorney's fees. The first set of Orders requested supplemental briefing on the attorney's fees issues and requested further detail of the fees requested. Those Orders are found in the Appendix at App. 1a and App. 4a. The second set of Orders were those granting the defendants their attorneys' fees. Those Orders are found in the Appendix at App. 7a and App. 17a.

CONCISE STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 3, 1999. Cross-Petitioners herein filed a petition for rehearing, which petition was denied on April 29, 1999.

Original Petitioners filed their Petition for Writ of Certiorari on July 2, 1999. This Conditional Cross-Petition is made pursuant to SCR 12.5 This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254, but only if this Court grants original Petitioners' Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C.S. § 1988 states, in relevant part:

> (b) In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C.S. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C.S. §§ 1681, *et seq.*], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 U.S.C.S. §§ 2000d, *et seq.*], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

Plaintiffs (original Petitioners and Cross-Respondents herein) filed complaints in January of 1994 (Hallman) and February of 1995 (Salesmen), respectively. The primary bases for the complaints were allegations of civil rights violations arising out of an underlying criminal investigation and prosecution of Plaintiffs. The Defendants in those cases were various prosecutors employed by the Washoe County District Attorney's Office in Reno, Nevada, three

investigators employed by the District Attorney, and the County itself (collectively referred to as the "D.A. Defendants"). The D.A. Defendants moved for partial summary judgment on the majority of Plaintiffs' claims based on the doctrines of qualified and absolute immunity. On August 26, 1996, the district court granted partial summary judgment in favor of the D.A. Defendants. With respect to the investigation that took place before the Grand Jury proceedings, the district court found that the D.A. Defendants were protected by qualified immunity. With respect to the events that occurred after the prosecutors began presenting evidence to the Grand Jury in an attempt to seek indictments, the district court found that absolute immunity applied. However, several secondary claims survived the granting of partial summary judgment, including claims that the D.A. Defendants violated Plaintiffs' civil rights by withholding seized evidence, civil rights claims for "defamation plus," state law claims for defamation and malicious prosecution, and claims against the County for unlawful custom and policy.

After the August 26 Order, the D.A. Defendants began to conduct discovery[1] and continued to defend the actions. In doing so, the D.A. Defendants had to respond to two motions for reconsideration (one of which was voluntarily withdrawn by Plaintiffs after the County threatened to apply for sanctions [HD 125; SD 98]), take over twenty depositions, file a motion

---

1. The D.A. Defendants conducted very little discovery before the August 26 Order because of their well-founded belief that they were subject to immunities and that having to conduct extensive and expensive discovery would defeat the very purpose of the immunities. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (noting that the important protections of the immunities are essentially lost if the defendants are forced to undergo discovery and trial).

for summary judgment on Plaintiffs' remaining claims, conduct an oral argument on the motion for summary judgment, file a "Daubert" motion with regard to Plaintiffs' expert witness, prepare the D.A. Defendants' experts for the "Daubert" hearing and for trial, and begin to prepare for a two to three week trial.

In October, in response to the D.A. Defendants' Motion for Summary Judgment on the remaining claims, Plaintiffs voluntarily dismissed the property retention claims and state law claims. SER 282-83. Then, at oral argument in December, Plaintiffs voluntarily dismissed all remaining claims against one of the D.A. Defendants, admitting that there was no basis for continuing to pursue him as a defendant. SER 286-90.

Therefore, the only claims that remained by the time of trial were the claims of defamation plus. With regard to the claims of defamation plus, Plaintiffs never identified any alleged statements made by Defendant Karl Hall that were alleged to be defamatory. However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. SER 286-90. Plaintiffs never identified any alleged statements ever made by Defendant Michael Neville that were alleged to be defamatory. However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. Further, Plaintiffs never identified any alleged statements ever made by Defendant John Long that were alleged to be defamatory. Their claims against Mr. Long were based solely on an allegation that he forwarded a copy of a public document (the indictment) to a third party. However they continued to pursue those claims even after they conceded that he never made any defamatory statements. Plaintiffs' sole allegation against Defendant Frank Landes was that he was

quoted in a newspaper as stating that "there was no unusual handling of the case." However, they continued to pursue those claims even after they conceded that he never made any defamatory statements. Finally, on January 8, 1997, only 13 days before the trial was scheduled to take place, Plaintiffs requested an emergency hearing to move for voluntary dismissal of all remaining claims against all remaining Defendants for the purported, if not pretextual, basis of expediting the appellate process. SER 291-95.

After the Plaintiffs ultimately voluntarily dismissed all of the remaining claims, the D.A. Defendants moved for their attorneys' fees in defending both actions from filing to final judgment. The district court denied without prejudice the D.A. Defendants' request for fees incurred prior to the immunities rulings, holding that "the analysis for frivolousness would be done better after the plaintiffs' appeal has been resolved." RE 424. However, the court subsequently granted the D.A. Defendants' request for attorneys' fees incurred after the immunities rulings, finding that the remaining claims asserted by plaintiffs were either frivolous at their inception or later became frivolous but were continued to be prosecuted by Plaintiffs. RE 427-32. *Hallman* Order Granting Fees, App. 7a; *Van der Hoeven* Order Granting Fees, App. 17a.

The district court, in granting attorneys' fees to the defendants, acknowledged the difficult legal standard that civil rights defendants have to meet to be entitled to an award of attorneys' fees under the civil rights statutes. *Hallman* Order Granting Fees, App. 9a; *Van der Hoeven* Order Granting Fees, App. 19a. The district court noted that "42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous,

unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so." *Id.* at 9a; 19a. The district court further noted that attorney's fees could only be granted to a prevailing defendant under very limited circumstances. However, as the court held: "This is such a case." *Id.*

In its analysis, the district court went through each of Plaintiffs' claims and discussed the facts and law with respect to each of those claims. The three most important claims that remained after the granting of summary judgment were Plaintiffs' claims of "retention of property" in violation of their civil rights, claims of "defamation plus," and claims against the County for unlawful policy and procedure. With regard to the property retention claims, the court found that:

> When defendant Washoe County moved (#114) for summary judgment on this claim, plaintiffs' response (#123) abandoned it. Their opposition (#152) to the attorney's fees motions does not explain this abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph LI to be mere contrivance; this claim was frivolous when filed.

Id. at 13a; 23a.

The district court then turned to the "defamation plus" claims. In doing so, the court noted the requirements for a claim of defamation under state law as well as what it would take to turn a state law defamation claim into a federal civil rights claim of "defamation plus." *Id.* at 14a-15a; 24a-25a. The court noted that for a defamation plus claim, the

defamation must be tied to a recognizable § 1983 claim. *Id.* at 15a; 25a. Thus, as the district court noted, a mere injury to reputation or goodwill is insufficient to form a defamation plus claim unless those injuries are shown under state law to be legally protected interests. *Id.* The court held that: "Nothing in plaintiffs' papers (#123, 129, 152) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1983 is not implicated." *Id.*

With regard to the County, the district court addressed the issue of whether Plaintiffs' unlawful custom or policy claims were also unfounded and frivolous. The court reviewed Plaintiffs' arguments supporting their claim of unlawful custom or policy and found that "this claim is plainly frivolous." *Id.* at 13a; 23a. The district court then found that the D.A. Defendants and the County were entitled to their attorneys' fees incurred after entry of summary judgment against Plaintiffs and until Plaintiffs finally voluntarily dismissed their remaining claims.

Plaintiffs appealed that determination to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the findings of the district court and reversed the award of attorneys' fees. The Ninth Circuit did not address the property retention claims that served as a partial basis for the district court's award of attorney's fees or the unlawful custom and policy claims against the County. The appeals court did, however, review the "defamation plus" claims. There, the court held that it was unreasonable for the district court to find that the defamation plus claim was meritless or frivolous.

ARGUMENT

I.

THE NINTH CIRCUIT FAILED TO ADDRESS CERTAIN GROUNDS UPON WHICH THE DISTRICT COURT AWARDED ATTORNEYS' FEES.

The primary bases for Plaintiffs' complaints were allegations of civil rights violations arising out of the underlying criminal investigation and prosecution of Plaintiffs. On August 26, 1996, after significant discovery by Plaintiffs had taken place, the district court ruled that the D.A. Defendants were entitled to qualified immunity for the investigation and absolute immunity for the grand jury proceedings. RE 396. However, several secondary claims survived that order, including a claim that the D.A. Defendants violated Plaintiffs' civil rights by withholding seized evidence, a civil rights claim for "defamation plus," state law claims for defamation and malicious prosecution, and a civil rights claim against the County for unlawful custom or policy.

After the August 26 Order, the D.A. Defendants were forced to expend a great deal of time and effort defending against the remaining claims. That effort included taking depositions of all Plaintiffs, engaging in further motion practice, and preparing for trial. However, based on various voluntary dismissals at various different stages, Plaintiffs' claims began to collapse one by one. Finally, only 13 days before the trial was scheduled to take place, and while Motions for Summary Judgment on all remaining claims were pending decision from the district court, Plaintiffs requested an emergency hearing to move for dismissal of all

remaining claims against all remaining Defendants. The D.A. Defendants agreed to the voluntary dismissal with the express reservation that they would be entitled to move for their attorney's fees incurred in defending Plaintiffs' frivolous claims.

The D.A. Defendants then moved for their attorneys' fees in defending both actions from filing to final judgment. The district court, in awarding attorneys' fees to the D.A. Defendants, focused primarily on three specific claims: (1) "property retention" claims; (2) "defamation plus" claims; and (3) "unlawful custom or policy" claims with respect to the County. The court addressed each of those claims separately and in detail in determining that the D.A. Defendants were entitled to their attorneys' fees. The district court found that the property retention claims were a "mere contrivance," and thus were "frivolous when filed." *Hallman* Order Granting Fees, App. 13a; *Van der Hoeven* Order Granting Fees, App. 23a. With respect to the defamation plus claims, the district court properly found that no federal civil right was implicated in those claims. Therefore, the district court found that Plaintiffs never made out a claim for defamation plus. *Hallman* Order Granting Fees, App. 15a. Finally, the Court held that the unlawful custom and policy claims against the City were "plainly frivolous." *Id.*

Despite the district court's grant of attorneys' fees based on each of those frivolous claims, the Ninth Circuit Court of Appeals entirely overlooked the issues of the frivolous property retention claims and the unlawful custom and policy claims. In its decision, the Ninth Circuit addressed only the issue of the "defamation plus claims." Pet. App. 17-20. The Ninth Circuit specifically ruled that "we hold that it was

error to find the defamation plus claim unreasonable or frivolous." *Id.* at 20. However, the Ninth Circuit did not address in any fashion the issue of Plaintiffs' equally frivolous and meritless purported federal civil rights claims for retention of property or the "plainly frivolous" claims of unlawful custom or policy. Therefore, the Ninth Circuit committed a significant error in reviewing the decision of the district court. That error should be corrected by this Court.

II.

THE NINTH CIRCUIT MISAPPREHENDED NEVADA LAW WITH REGARD TO THE ISSUE OF WHETHER BUSINESS GOODWILL IS A PROTECTED PROPERTY RIGHT IN NEVADA.

In ruling on the defamation plus claims, the district court properly concluded that reputation and goodwill are not legally protected interests under Nevada law. In fact, Nevada law does not protect reputation or goodwill as legally protected interests. However, in the section of its decision dealing with the second claim of defamation-plus, the Ninth Circuit found that the district court overlooked the relevant portion of Plaintiffs' pleadings where Plaintiffs cited specific cases for the principle that business goodwill is a protected property right in Nevada. Petitioners' App. 20. In reaching this conclusion, the appeals court misunderstood and misapplied Nevada law. In its decision, the Ninth Circuit noted the Plaintiffs' citation to various cases for the proposition that Nevada law recognizes goodwill or reputation as a generally protected property interest. *See* Petitioners' App. 20, n.4 (citing *Ford v. Ford*, 782 P.2d 1304 (Nev. 1989) and *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 396 P.2d 683 (Nev. 1964)). However, neither *Ford* nor *Zale-*

Las Vegas, Inc. stand for the proposition for which Plaintiffs cited them, a detail which was pointed out to Plaintiffs' counsel by the United States Magistrate Judge during oral argument on the Motions for Summary Judgment. WCSER 202-05. While the *Ford* case recognizes that a professional practice's goodwill is part of the community property which is subject to division at divorce, the Nevada Supreme Court has never expanded its holding to recognize goodwill as a property interest in any situation other than divorce. *See Williams v. Waldman*, 836 P.2d 614 (Nev. 1992); *Malmquist v. Malmquist*, 792 P.2d 372 (Nev. 1990). Thus, the Ninth Circuit's decision with respect to the "plus" that makes up a claim of defamation plus is contrary to the law of the highest court of the state of Nevada. This Court should grant Certiorari in this case to correct the error made by the Ninth Circuit Court of Appeals in improperly applying law of the Nevada Supreme Court with respect to a state law issue.

III.

ALTHOUGH THE NINTH CIRCUIT PROPERLY CITED AN "ABUSE OF DISCRETION" STANDARD OF REVIEW, IT ESSENTIALLY REVIEWED THE DISTRICT COURT'S FINDINGS *DE NOVO*.

So long as the district court uses the proper legal standard for addressing attorneys' fees, awards of attorneys' fees are reviewed under an abuse of discretion standard. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Although the Ninth Circuit cited that standard of review, (Petitioners' App. 10), the D.A. Defendants submit that the Ninth Circuit did not provide the deference to the district court's findings required under that standard. The district court was fully aware of the history and procedure of Plaintiffs' claims at the time that it

awarded attorneys' fees. However, the Ninth Circuit did not give any deference to the findings of the district court on this issue and essentially reviewed the district court's findings *de novo*. For instance, the Panel found that the district court "apparently overlooked" portions of Hallman's papers with regard to the issue of protected property rights. However, that issue was discussed at length in the oral arguments on summary judgment before the magistrate on December 16, 1997. SER 286-90 (excerpt of transcript of hearing).

While the Ninth Circuit Court of Appeals cited to the appropriate legal standard for a review of an attorneys' fees award, it did not actually apply that standard. The district court used the proper legal standard in awarding attorneys' fees and was most familiar with the facts and procedures that led to an award of attorneys' fees to the Defendants. Thus, the district court did not abuse its discretion in awarding those attorneys' fees and the Ninth Circuit Court's reversal of that award was contrary to the law of this Court with respect to the proper deference to be given to the district court's findings and the proper application of the "abuse of discretion" standard of review.

Trial courts are on the front line of cases such as these. They live with the cases for months, if not years. The trial courts know not only what is shown on the docket sheet, but also the nuances and dynamics of the litigation. When a trial court makes a determination using the proper legal standard, and correctly applies the law to the facts of which the trial court is most keenly aware, that determination must, under the law, be given deference. This Court should grant Certiorari to clarify the proper deference that an appeals court should apply to a trial court's conclusions of fact when that trial court considers and properly applies the correct law to those facts.

CONCLUSION

The district court in this matter properly awarded Defendants and Cross-Petitioners herein their attorneys' fees in defending frivolous claims filed by Plaintiffs. The Defendants and the district court realized the heightened standard under the law in awarding attorney's fees to prevailing civil rights Defendants. However, this was a case where, even recognizing the heightened standard, the district court found that Defendants were entitled to some of their attorney's fees. The Ninth Circuit essentially ignored the findings of the district court in reversing that judgment. Based on the review given by the Ninth Circuit, the attorney's fees provisions of § 1988 become completely eviscerated with respect to prevailing Defendants. This Court should grant Certiorari to clarify that the law with regard to § 1988 has bearing and should be followed by the Courts.

Respectfully submitted,

LARRY R. HICKS
Counsel of Record
PAUL J. GEORGESON
MCDONALD CARANO WILSON
MCCUNE BERGIN FRANKOVICH
& HICKS LLP
241 Ridge Street
Fourth Floor
Reno, Nevada 89505-2670
(775) 788-2000

Attorneys for Cross-Petitioners Dorothy Nash-Holmes, Donald Coppa, Karl Hall III, Frank Landes, James Long and Michael Neville

MELANIE FOSTER
OFFICE OF WASHOE COUNTY
DISTRICT ATTORNEY
195 South Sierra Street
Third Floor
P.O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3400

Attorney for Cross-Petitioner Washoe County

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *HERB HALLMAN CHEVROLET, et al. v. DOROTHY NASH HOLMES, et al.* DATED JUNE 18, 1997, FILED JUNE 19, 1997 AND ENTERED JUNE 20, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-94-33-DWH(RAM)

HERB HALLMAN CHEVROLET, INC., et al.,

— Plaintiffs,

vs.

DOROTHY NASH HOLMES, et al.,

Defendants.

ORDER

Before the court are prevailing defendants' timely post-judgment motions (##'s 141 and 142) for attorney's fees pursuant to 42 U.S.C. § 1988. These motions, originally referred to the magistrate judge pursuant to 28 U.S.C. § 636, were resubmitted June 16, 1997, following the magistrate judge's recusal.

Pursuant to F.R.Civ.P. 54(d)(2)(B), where an appeal on the merits has been taken, the court either may rule on the motion or deny it without prejudice, directing a new period for filing after the appeal has been resolved. *See*, Advisory Committee Notes, 1993 Amendments to F.R.Civ.P. 54.

§ 1988 is a fee-shifting statute, authorizing the court in its discretion to assess the reasonable attorney's fees of the prevailing party to the losing party. It is settled law that the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("(A) district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.") applies to § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2 (1983). However, for plaintiff's claims disposed of as of August 26, 1996, the analysis for frivolousness would be done better after plaintiff's appeal has been resolved. Accordingly, defendants' motions for those attorney's fees are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

As for defendants' attorney's fees incurred defending against the claims dismissed January 13, 1997 at plaintiff's request, there is no reason for delay. A decision whether those claims were frivolous will not be aided by the Ninth Circuit's ruling as to plaintiff's other claims. Defendants' motion must be supplemented, however. It does not tell when the work was done and what it was. Accordingly, defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

Appendix A

IT IS THEREFORE ORDERED that defendants' motions for attorney's fees incurred before August 26, 1996 are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

IT IS FURTHER ORDERED that defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

DATED: This 18th of June, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *JERRY VAN DER HOEVEN v. DONALD COPPA, et al.* DATED JUNE 18, 1997, FILED JUNE 19, 1997 AND ENTERED JUNE 23, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-95-90-DWH(RAM)

JERRY VAN DER HOEVEN,

Plaintiff,

vs.

DONALD COPPA, et al.,

Defendants.

ORDER

Before the court are prevailing defendants' timely post-judgment motions (##'s 112 and 112A) for attorney's fees pursuant to 42 U.S.C. § 1988. These motions, originally referred to the magistrate judge pursuant to 28 U.S.C. § 636, were resubmitted June 16, 1997, following the magistrate judge's recusal.

Pursuant to F.R.Civ.P. 54(d)(2)(B), where an appeal on the merits has been taken, the court either may rule on the motion or deny it without prejudice, directing a new period for filing after the appeal has been resolved. *See*, Advisory Committee Notes, 1993 Amendments to F.R.Civ.P. 54.

Appendix B

§ 1988 is a fee-shifting statute, authorizing the court in its discretion to assess the reasonable attorney's fees of the prevailing party to the losing party. It is settled law that the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("(A) district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.") applies to § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2 (1983). However, for plaintiff's claims disposed of as of August 26, 1996, the analysis for frivolousness would be done better after plaintiff's appeal has been resolved. Accordingly, defendants' motions for those attorney's fees are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

As for defendants' attorney's fees incurred defending against the claims dismissed January 13, 1997 at plaintiff's request, there is no reason for delay. A decision whether those claims were frivolous will not be aided by the Ninth Circuit's ruling as to plaintiff's other claims. Defendants' motion must be supplemented, however. It does not tell when the work was done and what it was. Accordingly, defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

IT IS THEREFORE ORDERED that defendants' motions for attorney's fees incurred before August 26, 1996 are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

IT IS FURTHER ORDERED that defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

DATED: This 18th day of June, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *HERB HALLMAN CHEVROLET, INC., et al. v. DOROTHY NASH-HOLMES, et al.* DATED AND FILED SEPTEMBER 25, 1997 AND ENTERED SEPTEMBER 29, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-94-33-DWH(RAM)

HERB HALLMAN CHEVROLET, INC., et al.,

Plaintiffs,

vs.

DOROTHY NASH-HOLMES, et al.,

Defendants.

ORDER

Before the court are defendants' renewed motions (#s 159, 162, 164) for attorney's fees under 42 U.S.C. § 1988 as prevailing defendants as to three claims ("defamation-plus", custom and policy and illegally retained property) brought under 42 U.S.C. § 1983 and voluntarily dismissed with prejudice[1] by plaintiffs on the eve of trial. After final

1. Plaintiffs dismissed all supplemental claims as well. These were claims Fifth through Eighth of the eight claim amended complaint.

judgment (#139) was entered in favor of defendants, they moved (#s 141, 142) for attorney's fees as to the whole case, including on claims as to which summary judgment had earlier been granted (# 85). Because the summary judgment was appealed following final judgment, the court (# 158) deferred until after resolution of that appeal the attorney's fees motion as to those claims, but entertained the attorney's fees request for work on the § 1983 claims plaintiffs voluntarily dismissed with prejudice on January 13, 1997. The motions (#s 141, 142), therefore, were denied without prejudice to the extent they sought fees for work on claims under appeal and the defendants were asked (# 158) identify only the work done between August 26, 1997 and January 13, 1997, on the § 1983 claims plaintiffs voluntarily had dismissed with prejudice. In response to the court's order (# 158), defendants have moved (#s 159, 162, 164) for those attorney's fees.

Plaintiffs' reply (# 163) does not place in dispute the reasonableness of either the work done by defendants' attorneys or the hourly rates applied. By this plaintiffs have conceded the lodestar[2] of this fee determination. On this record, the court finds Washoe County required 43.75 hours of the time of the Washoe County District Attorney's office and the other defendants were billed 381.5 hours by their attorneys for legal services on those claims during that period. These attorney hours reasonably were required by

---

2. A word now universally applied to the product of reasonable hours multiplied by a reasonable hourly rate, first given this meaning in *Lindy Bros. Bldrs. Inc. of Philadelphia v. American Radiation & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

these defendants. The court also finds that $140.00 per hour for these services is a reasonable rate, if a bit low.

42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous, unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so. See *Schutts v. Bently Nevada Corporation*, 1997 WL 321780 (D.Nev.). In other words, if any or all of the claims plaintiff voluntarily dismissed with prejudice were "meritless in the sense [of] groundless or without foundation," *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), or if "the plaintiff continued to litigate after it clearly became so," *Id.*, at 15 (quoting from *Christiansburg*[3] with approval), then assessing to plaintiff his opponent's attorney's fees is authorized. A court may grant attorney's fees to a defendant under § 1988 only under these limited circumstances, however. See *Maag v. Wessler*, 993 F.2d 718, 719 (9th Cir. 1993); *Nevada Entertainment Ind. v. City of Henderson*, 8 F.3d 1348, 1352 (9th Cir. 1993) ("prevailing defendants in civil rights actions are awarded attorneys fees only in 'exceptional cases.' "). This is such a case.

The Claims

The three claims in question (defamation-plus, custom or policy, and illegal retention of seized property) actually relate to the first three and the fifth claims out of eight alleged in the last seven pages of the thirty-nine page amended

---

3. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

complaint (# 5). The amended complaint contained in all 104 (CIV) Roman numbered paragraphs. Before reaching the claims, however, a reader must wade through thirty-two pages containing seventy-seven paragraphs of often vague and imprecise factual allegations, suggesting the product is more the drafter's legal fancy than the report of the party. Each of these paragraphs is incorporated into every claim, and each claim is incorporated into the claim which follows it.

As a practical matter, claims six, seven and eight (the supplemental claims other than defamation), and claim three (for declaratory and injunctive relief) received no measurable attention from the attorneys on either side after August 26, 1996. The court finds the time spent by defendants' counsel from then until January 13, 1997, was focused on claims one, two, four and five (conspiratorial deprivation of constitutional rights, custom and policy, personal liability and defamation, respectively) as they related to what was left of those claims after order # 85,[4] *viz.*, defamation-plus, custom and policy, and illegal retention of property.

Plaintiffs' defamation claim (claim five) contains only three paragraphs (XCIII, XCIV and XCV). The first incorporates into the claim "paragraphs I-XCII herein as if

---

4. Order # 85 ruled that the district attorney defendants had absolute immunity on plaintiffs' 1983 claims after July 8, 1992, except claims of defamation-plus and illegal retention of seized property granted summary judgment in accordance with that ruling, and also granted summary judgment to defendants on the second claim, also except for defamation-plus and retention of seized property claim.

fully set forth at this point." *Id.* The second consists entirely of the following sentence:

> Defendants made or caused to be made false and defamatory statements of and concerning plaintiffs to third persons, negligently and with actual malice, causing the aforementioned damages. *Id.*

The third paragraph alleges entitlement to punitive damages. No defamatory statement is identified in the fourth claim, leaving the reader to sift through the sixty-five incorporated factual allegations looking for one.

Plaintiffs' custom or policy claim (claim two) consists of two paragraphs (LXXXIII and LXXXIV). The first incorporates all preceding paragraphs and the second merely alleges employee responsible for establishing policy for the City of Reno and Washoe County sanctioned conduct amounting to violations of constitutional rights of plaintiffs.

Plaintiffs' illegal retention of property claim is not alleged in any numbered claim, but it perhaps can be inferred from the allegations in the first and fourth claims (deprivations of constitutional rights) *if* facts concerning such retention can be found in one the seventy-seven factual allegation paragraphs incorporated into the first claim. None can, unless paragraph LI is an adequate allegation of fact, a matter which, it will be seen, is mooted by plaintiffs' tacit abandonment of this claim.

Appendix C

Discussion

Custom and Policy Liability of Washoe County
(plaintiffs' second claim)

After the court's August 26, 1996, order (# 85), the defendants again moved (#s 114, 115) for summary judgment. Plaintiffs opposed (#s 123, 129) and defendants replied (#s 130, 131). Defendant Washoe County urges now (# 153) that plaintiffs did not produce (F.R.Civ.P 56(e)) evidence giving rise to a genuine issue of material fact for trial on the existence of a custom or policy of Washoe County to violate anyone's constitutional rights under any theory of plaintiffs' complaint.

While Washoe County cannot be liable on a *respondeat superior* theory under § 1983, it can be liable where a plaintiff's constitutional rights were violated as a result of an official county policy. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). A county employee with final decisionmaking power on the issue in question may by her actions and decisions be found to have made such a policy. *Id.*

Plaintiffs responded (# 123) to the county's motion with an apparently contrived play on words. At the deposition of defendant district attorney, plaintiffs' counsel inserted the word "policy" into a question thus: "Does your policy concerning contacts with the media apply to this document?" The answer given was: "My policy concerns deputies' contacts with the media. Obviously the District Attorney often comments on things in addition to that." Plaintiffs'

counsel did not pursue the matter further. On the basis of *this answer only*, given the day before plaintiffs' filed this opposition (#123), plaintiffs argue Washoe County was liable under § 1983 for whatever defamatory statement the district attorney might happen to make. This claim is plainly frivolous. Because plaintiffs point to nothing else in support of their custom and policy claim, it was probably frivolous when filed, but certainly frivolous after August 26, 1996.

The Retention of Property Claim

By their complaint plaintiffs alleged:

> Plaintiffs are informed and believe, and thereon aver, that Defendants ultimately obtained and retained custody and control of some or all of the documents and other items seized pursuant to the search warrants, and continue to hold the lion's share of these items to this day. These records are business records needed by Plaintiffs to conduct day-to-day business. Amended complaint (# 5), paragraph LI.

When defendant Washoe County moved (# 114) for summary judgment on this claim, plaintiffs' response (# 123) abandoned it. Their opposition (# 152) to the attorney's fees motions does not explain this abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph LI to be mere contrivance; this claim was frivolous when filed.

Appendix C

Defendant Washoe County will be awarded its attorney's fees as requested under 42 U.S.C. § 1988 for the period August 26, 1996 to January 13, 1997.

Washoe County also asks for attorneys' fees under 28 U.S.C. § 1927. Such an award would require a finding plaintiffs' counsel has acted so recklessly or in bad faith in the matter of these claims as to constitute a willful abuse of the judicial process. *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987). On the record before it, the court declines to do so.

The Defamation-plus Claim Against the Remaining Defendants

The claims plaintiffs voluntarily dismissed are the supplemental claims, including defamation, and the three § 1983 claims: "defamation-plus"; custom and policy liability; and illegally retained property. As discussed above, the last two were or have become frivolous. Because § 1988 is unconcerned with supplemental claims, frivolous or not, all that remains for discussion is the defamation-plus claim.

To establish a *prima facie* case of defamation in Nevada, a plaintiff must prove:

(1) a false and defamatory statement by defendant concerning the plaintiff;

(2) an unprivileged publication to a third person;

(3) fault, amounting to at least negligence; and

(4) actual or presumed damages.

Chowdhry v. NLVH, INC., 109 Nev.478, 483 (1993) (citing RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Defamation, alone, by a public official is not actionable under 42 U.S.C. § 1983. *Paul v. Davis,* 424 U.S. 693, 700-02 (1976). To state a "defamation-plus" claim, something which is actionable under § 1983, plaintiff "must join a defamation claim to a recognizable section 1983 wrong. . . ." *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992) (en banc); *Cooper v. Dupnik,* 924 F.2d 1520, 1532 (9th Cir. 1991) ("To state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in connection with the allegation of injury to reputation.") Thus, mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims. *Id.* at 1533-34. Nothing in plaintiffs' papers (#s 123, 129, 152) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1988 is not implicated.

On the record before it, the court finds plaintiffs' "defamation-plus" claim to be frivolous.

Accordingly, **IT IS ORDERED** that defendants' renewed motions (# 159, 162, 164) for attorney's fees are GRANTED, except that defendant Washoe County's motion

for 28 U.S.C. § 1927 attorney's fees is DENIED; defendants' original motions (#s 141, 142) for attorney's fees are DENIED as moot, without prejudice to their timely renewal after determination of the appeal. Defendant Washoe County shall recover from plaintiffs attorney's fees in the sum of $6,125.00; the other defendants shall recover from plaintiffs their attorney's fees in the sum of $53,410.00. Let judgment be entered accordingly.

DATED: This 25th day of September, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *JERRY VAN DER HOEVEN, et al. v. DONALD COPPA, et al.* DATED AND FILED SEPTEMBER 25, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-95-90-DWH(RAM)

JERRY VAN DER HOEVEN, et al.,

Plaintiffs,

vs.

DONALD COPPA, et al.,

Defendants.

ORDER

Before the court are defendants' renewed motions (#s 129, 130, 132) for attorney's fees under 42 U.S.C. § 1988 as prevailing defendants as to three claims ("defamation-plus", custom and policy and illegally retained property) brought under 42 U.S.C. § 1983 and voluntarily dismissed with prejudice[1] by plaintiffs on the eve of trial. After final judgment (#111) was entered in favor of defendants, they moved (#s 112, 112A) for attorney's fees as to the whole case, including on claims as to which summary judgment

1. Plaintiffs dismissed all supplemental claims as well. These were claims Fourth through Tenth of the ten claim complaint.

had earlier been granted (# 56). Because the summary judgment was appealed following final judgment, the court (# 128) deferred until after resolution of that appeal the attorney's fees motion as to those claims, but entertained the attorney's fees request for work on the § 1983 claims plaintiffs voluntarily dismissed with prejudice on January 13, 1997. The motions (#s 112, 112A), therefore, were denied without prejudice to the extent they sought fees for work on claims under appeal and the defendants were asked (# 128) identify only the work done between August 26, 1997 and January 13, 1997, on the § 1983 claims plaintiffs voluntarily had dismissed with prejudice. In response to the court's order (# 128), defendants have moved (#s 129, 130, 132) for those attorney's fees.

Plaintiffs' reply (# 131) does not place in dispute the reasonableness of either the work done by defendants' attorneys or the hourly rates applied. By this plaintiffs have conceded the lodestar[2] of this fee determination. On this record, the court finds Washoe County required 30.75 hours of the time of the Washoe County District Attorney's office and the other defendants were billed 52.75 hours by their attorneys for legal services on those claims during that period. These attorney hours reasonably were required by these defendants. The court also finds that $130.00 per hour for these services is a reasonable rate, if a bit low.

---

2. A word now universally applied to the product of reasonable hours multiplied by a reasonable hourly rate, first given this meaning in *Lindy Bros. Bldrs. Inc., of Philadelphia v. American Radiation & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

Appendix D

42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous, unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so. See *Schutts v. Bently Nevada Corporation*, 1997 WL 321780 (D.Nev.). In other words, if any or all of the claims plaintiff voluntarily dismissed with prejudice were "meritless in the sense [of] groundless or without foundation," *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), or if "the plaintiff continued to litigate after it clearly became so," *Id.*, at 15 quoting from *Christiansburg*[3] with approval), then assessing to plaintiff his opponent's attorney's fees is authorized. A court may grant attorney's fees to a defendant under § 1988 only under these limited circumstances, however. See *Maag v. Wessler*, 993 F.2d 718, 719 (9th Cir. 1993); *Nevada Entertainment Ind. v. City of Henderson*, 8 F.3d 1348, 1352 (9th Cir. 1993) ("prevailing defendants in civil rights actions are awarded attorneys fees only in 'exceptional cases.' "). This is such a case.

The Claims

The three claims in question (defamation-plus, custom or policy, and illegal retention of seized property) actually relate to the first four "claims" out of ten set forth on the last seven pages of the thirty-eight page complaint (# 1). The complaint contained in all ninety-nine (XCIX) Roman numbered paragraphs. Before reaching the claims, however, a reader must wade through thirty pages containing sixty-six

---

3. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

paragraphs of often vague and imprecise factual allegations, suggesting the product is more the drafter's legal fancy than the report of the party. Each of these paragraphs is incorporated into every claim, and each claim is incorporated into the claim which follows it.

As a practical matter, claims five through ten (the supplemental claims other than defamation) received no measurable attention from the attorneys on either side after August 26, 1996. The court finds the time spent by defendants' counsel from then until January 13, 1997, was focused on claims one through four (conspiratorial deprivation of constitutional rights, custom and policy, personal liability and defamation, respectively) as they related to what was left of those claims after orders #33[4] and #56,[5] *viz.*, defamation-plus, custom and policy, and illegal retention of property.

Plaintiffs' defamation claim (claim four) contains only three paragraphs (LXXIX, LXXX and LXXXI). The first incorporates into the claim "paragraphs I-LXXVIII herein

---

4. Order # 33 ruled that because plaintiffs filed their complaint on February 10, 1995, any claims accruing before February 10, 1993, were barred by the statute of limitations. NRS 11.190(4)(e).

5. Order # 56 ruled that the district attorney defendants had absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, except claims of defamation-plus and illegal retention of seized property, granted summary judgment in accordance with that ruling, and also granted summary judgment to defendants on the second claim, also except for defamation-plus and retention of seized property claims.

as if fully set forth at this point." *Id.* The second consists entirely of the following sentence:

> Defendants made or caused to be made false and defamatory statements of and concerning plaintiffs to third persons, negligently and with actual malice, causing the aforementioned damages. *Id.*

The third paragraph alleges entitlement to punitive damages. No defamatory statement is identified in the fourth claim, leaving the reader to sift through the sixty-six incorporated factual allegations looking for one.

Plaintiffs' custom or policy claim (claim two) consists of two paragraphs (LXXII and LXXIII). The first incorporates all preceding paragraphs and the second merely alleges employees responsible for establishing policy for the City of Reno and Washoe County sanctioned conduct amounting to violations of constitutional rights of plaintiffs.

Plaintiffs' illegal retention of property claim is not alleged in any numbered claim, but it perhaps can be inferred from the allegations in the first claim (deprivations of constitutional rights, including rights under the Fourteenth Amendment) *if* facts concerning such retention can be found in one the sixty-five factual allegation paragraphs incorporated into the first claim. None can, unless paragraph XLIX is an adequate allegation of fact, a matter which, it will be seen, is mooted by plaintiffs' tacit abandonment of this claim.

Appendix D

Discussion

Custom and Policy Liability of Washoe County
(plaintiffs' second claim)

After the court's August 26, 1996, order (# 56), the defendants again moved (#s 87, 88) for summary judgment. Plaintiffs opposed (#s 96, 101) and defendants replied (#s 102, 103). Defendant Washoe County urges now (# 122) that plaintiffs did not produce (F.R.Civ.P. 56(e)) evidence giving rise to a genuine issue of material fact for trial on the existence of a custom or policy of Washoe County to violate anyone's constitutional rights under any theory of plaintiffs' complaint.

While Washoe County cannot be liable on a *respondeat superior* theory under § 1983, it can be liable where a plaintiff's constitutional rights were violated as a result of an official county policy. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). A county employee with final decision-making power on the issue in question may by her actions and decisions be found to have made such a policy. *Id.*

Plaintiffs responded (# 96) to the county's motion with an apparently contrived play on words. At the deposition of defendant district attorney, plaintiffs' counsel inserted the word "policy" into a question thus: "Does your policy concerning contacts with the media apply to this document?" The answer given was: "My policy concerns deputies' contacts with the media. Obviously the District Attorney often comments on things in addition to that." Plaintiffs'

counsel did not pursue the matter further. On the basis of *this answer only*, given the day before plaintiffs' filed this opposition (# 96), plaintiffs argue Washoe County was liable under § 1983 for whatever defamatory statement the district attorney might happen to make. This claim is plainly frivolous. Because plaintiffs point to nothing else in support of their custom and policy claim, it was probably frivolous when filed, but certainly frivolous after August 26, 1996.

The Retention of Property Claim

By their complaint plaintiffs alleged:

> Plaintiffs are informed and believe, and thereon aver, that Defendants ultimately obtained and retained custody and control of some or all of the documents and other items seized pursuant to the search warrants, and continue to hold the lion's share of these items to this day, despite dismissal of criminal charges against Plaintiffs.

Complaint (# 1), Paragraph XLIX.

When defendant Washoe County moved (# 87) for summary judgment on this claim, plaintiffs' response (# 96) did not oppose it. Nor does their opposition (# 120) to the attorney's fees motions explain this tacit abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph XLIX to be mere contrivance; this claim was frivolous when filed,

Appendix D

Defendant Washoe County will be awarded its attorney's fees as requested under 42 U.S.C. § 1988 for the period August 26, 1996 to January 13, 1997.

Washoe County also asks for attorneys' fees under 28 U.S.C. § 1927. Such an award would require a finding plaintiffs' counsel has acted so recklessly or in bad faith in the matter of these claims as to constitute a willful abuse of the judicial process. *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987). On the record before it, the court declines to do so.

The Defamation-plus Claim Against the Remaining Defendants

The claims plaintiffs voluntarily dismissed are the seven supplemental claims, including defamation, and the three § 1983 claims: "defamation-plus"; custom and policy liability; and illegally retained property. As discussed above, the last two were or have become frivolous. Because § 1988 is unconcerned with supplemental claims, frivolous or not, all that remains for discussion is the defamation-plus claim.

To establish a *prima facie* case of defamation in Nevada, a plaintiff must prove:

(1) a false and defamatory statement by defendant concerning the plaintiff;

(2) an unprivileged publication to a third person;

(3) fault, amounting to at least negligence; and

(4) actual or presumed damages.

Chowdhry v. NLVH, Inc., 109 Nev.478, 483 (1993) (citing RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Defamation, alone, by a public official is not actionable under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693, 700-02 (1976). To state a "defamation-plus" claim, something which is actionable under § 1983, plaintiff "must join a defamation claim to a recognizable section 1983 wrong. . . ." *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992) (en banc); *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) ("To state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in connection with the allegation of injury to reputation."). Thus, mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims. *Id.* at 1533-34. Nothing in plaintiffs' papers (#s 96, 101, 131) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1988 is not implicated.

On the record before it, the court finds plaintiffs' "defamation-plus" claim to be frivolous.

Accordingly, **IT IS ORDERED** that defendants' renewed motions (# 129, 130, 132) for attorney's fees are GRANTED, except that defendant Washoe County's motion

for 28 U.S.C. § 1927 motion for attorney's fees is DENIED; defendants' original motions (#s 112, 112A) for attorney's fees are DENIED as moot, without prejudice to their timely renewal after determination of the appeal. Defendant Washoe County shall recover from plaintiffs attorney's fees in the sum of $3,997.50; the other defendants shall recover from plaintiffs their attorney's fees in the sum of $6,857.50. Let judgment be entered accordingly.

DATED: This 25th day of September, 1997.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 29, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-15275
D.C. No. CV-94-00333-DWH

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,

Plaintiffs-Appellants,

v.

DOROTHY NASH-HOLMES; et al.,

Defendants-Appellees.

No. 97-15323
D.C. No. CV-95-00090-DWH

JERRY VAN DER HOEVEN; et al.,

Plaintiffs-Appellants,

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,

Defendants-Appellees.

Appendix E

No. 97-16960
D.C. No. CV-95-00090-DWH

JERRY VAN DER HOEVEN; et al.,

Plaintiffs-Appellants,

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,

Defendants-Appellees.

No. 97-16976
D.C. No. CV-94-00333-DWH

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,

Plaintiffs-Appellants,

v.

DOROTHY NASH-HOLMES; et al.,

Defendants-Appellees.

ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

Appellees' petition for rehearing is denied.

Supreme Court, U.S.
FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 99-211

IN THE

Supreme Court of the United States

DOROTHY NASH-HOLMES, et. al.,

Petitioners,

–against–

HERB HALLMAN CHEVROLET, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL
CROSS-PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

COUNSEL OF RECORD

AMY ADELSON
Of Counsel

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION 3

I. THERE IS NO IMPORTANT, NOVEL OR COMPLEX QUESTION RAISED BY THE NINTH CIRCUIT'S DECISION THAT DEFENDANTS WERE NOT ENTITLED TO ATTORNEYS' FEES IN CONNECTION WITH PLAINTIFFS' DEFAMATION PLUS CLAIMS 3

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Christiansburg Garment Co. V. EEOC,
434 U.S. 412 (1978) 4

Cooper v. Dupnik,
924 F.2d 1520 (9th Cir. 1991) 4

Hall v. Bolger,
768 F.2d 1148 (9th Cir. 1985) 4

Hughes v. Rowe,
449 U.S. 5 (1980) 4

STATUTES AND RULES

42 U.S.C. § 1983 3

42 U.S.C. § 1988 3

Rule 10 of the Rules of the Supreme Court 5

STATEMENT OF THE CASE

As set forth more fully in the related Petition for a Writ of Certiorari filed on July 2, 1999 by John P. Stanko, Herb Hallman Chevrolet, Inc. (the "dealership"), and several of the dealership's employees, the defendants in this civil rights case -- cross-petitioners here -- were granted partial summary judgment on the ground that they were immune from suit on most of the civil rights claims.

The claims that were not dismissed arose out of press releases and other statements the defendants made to the media throughout the three year investigation of the plaintiffs. Specifically, plaintiffs alleged that the defendants published false and defamatory statements to the media after the indictments were returned and the plaintiffs were arrested, and following the District Attorney's voluntary dismissal of the indictment.

The amended complaint alleged in some detail specific defamatory remarks defendants made about the plaintiffs. For example, the amended complaint alleged that, shortly after the indictments were returned and the arrest warrants were issued, in an article dated July 4, 1993 in Daily Spark's Tribune, defendant Dorothy Nash-Holmes, the District Attorney of Washoe County, stated "We think there was a lot of scamming involved," and "We thought the whole operation was fraudulent in terms of the files we looked at." (RE 23) The amended complaint also alleged that, in July 1993, in the Reno Gazette-Journal, defendant Donald Coppa, the chief Deputy District Attorney, made similar comments about the dealership's purportedly dishonest dealings with public. (Id.)

The amended complaint also detailed defamatory statements made by defendant Holmes shortly after the District Attorney's office voluntarily dismissed all of the charges against the dealership, Stanko, and all but two of the employees. Holmes

told the press that "the court is requiring us to dismiss the charges against Stanko and the dealership because of how they ar plead, not a lack of evidence" (RE 31), a statement the Nevada state court later characterized as a misrepresentation of what took place. (RE 335-36) And, even though a Deputy District Attorney had stipulated that there was not even "slight or marginal evidence" to support the charges, Holmes again accused the plaintiffs of engaging in fraud, stating that "dozens of victims were cheated for paying for warranties they didn't want, the rebates were kept from them, and lease contracts were hiked up" (RE 31), a statement which the Nevada court, in its scathing opinion, criticized as ethically improper.

The amended complaint alleged that these statements, as well as other similar statements made to the dealership's customers, damaged plaintiffs' reputation and good will. (RE 31, 33) Plaintiffs also alleged that defendant Coppa threatened plaintiffs that if they "went public" with their criticism of the investigation, there would be "adverse publicity," and that this had a "chilling effect" on plaintiffs' exercise of their First Amendment rights (RE 33), and that the defamatory statements were made pursuant to the unconstitutional searches and arrests and to deter plaintiffs from pursuing a civil rights claim against the defendants. (RE 34, 30, 31)

Plaintiffs had made a substantial record supporting a due process claim for "defamation plus." Nevertheless, after defendants moved for summary judgment on the remaining claims (a motion plaintiffs opposed), the plaintiffs voluntarily agreed to dismiss their remaining claims. Plaintiffs made it clear that their purpose in seeking the dismissal of the defamation plus claims, as well as the other remaining claims, was to expedite the appeal on the dismissed constitutional claims -- an appeal that could not be pursued until a final judgment was entered. (RE 409)

Defendant moved for attorneys' fees pursuant to 42 U.S.C. § 1988. The District Court, without addressing the merits of the defamation claim, and without mention of the fact that the amended complaint had already survived a motion to dismiss, found plaintiffs due process-defamation plus claim to be frivolous and awarded defendants attorneys' fees.

The Ninth Circuit reversed.[1] Noting that, under existing Ninth Circuit law, a plaintiff can state a cognizable claim pursuant to 42 U.S.C. § 1983 for "defamation-plus," the Ninth Circuit held that the plaintiffs had asserted a defamation plus claim and that their claim was not so frivolous or so lacking in merit as to justify an award of attorneys' fees to the defendants. (App. 17-20)

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. THERE IS NO IMPORTANT, NOVEL OR COMPLEX QUESTION RAISED BY THE NINTH CIRCUIT'S DECISION THAT DEFENDANTS WERE NOT ENTITLED TO ATTORNEYS' FEES IN CONNECTION WITH PLAINTIFFS' DEFAMATION PLUS CLAIMS

In seeking a conditional writ of certiorari, the defendants do not assert that the Ninth Circuit applied the wrong standard in rejecting their claim for attorneys' fees, nor do they claim that the law concerning when prevailing defendants are entitled to attorneys' fees is confusing or should be changed.[2]

---

[1] The Ninth Circuit opinion is set forth in Petitioners' July 2, 1999 Petition for a Writ of Certiorari at App. 1.

[2] Defendants apparently concede that attorneys fees are to be granted to a prevailing defendant in a civil rights case only

Instead, the defendants criticize the Ninth Circuit for not addressing each of the separate grounds asserted by the defendants as a basis for attorneys' fees, and for purportedly misunderstanding the law of Nevada concerning whether good will constitutes a property right. They then ask this Court to review the decision to "clarify" the level of deference that should be granted to trial court decisions granting attorneys' fees to prevailing defendants.

There is no need for this Court's intervention. The Ninth Circuit has long held that it reviews legal questions concerning an award of attorneys' fees de novo, and if the district court applied the correct legal standard, reviews for abuse of discretion questions concerning the propriety and amount of the fees. See, e.g., Hall v. Bolger, 768 F.2d 1148, 1150 (9th Cir. 1985). The Court correctly applied that standard in this case and determined that the plaintiffs had made out a cognizable claim for defamation-plus under well-established Ninth Circuit law, see Cooper v. Dupnik, 924 F.2d 1520 (9th Cir. 1991); that the claim had survived a motion to dismiss; and that it was appropriate for plaintiffs to continue to litigate their defamation-plus claim even after the majority of their civil rights claims had been dismissed on immunity grounds.

The decision of the Ninth Circuit is not in conflict with any other Court of Appeals decision; does not decide an important federal question in a way that conflicts with any other appellate decision; and does not depart from the "accepted and usual course of judicial proceedings" in such a fashion as to call

---

in exceptional cases and only when the law suit was frivolous, vexatious, or brought in bad faith. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (addressing Title VII claim); Hughes v. Rowe, 449 U.S. 5, 13 (1980) (addressing civil rights claim).

for an exercise of this Court's supervisory power. Rule 10 of the Supreme Court Rules. The conditional cross-petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

Nathan Z. Dershowitz
COUNSEL OF RECORD
Dershowitz & Eiger, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

Attorneys for Petitioners

Amy Adelson
Of Counsel